CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 79-152

THE HOME INDEMNITY COMPANY,
Petitioner,

vs.

BARBARA A. STILLWELL,
Respondent,

and

R. E. LEE ELECTRIC COMPANY, INC.,
Respondent,

and

HEYL & PATTERSON INTERNATIONAL, INC.,
Respondent,

and

TRAVELERS INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH F. MANES
Finney Farm
Croton-on-Hudson,
New York 10520
Attorney for Petitioner

TABLE OF CONTENTS

Cases Cited

Statutes and Rules Cited

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Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 1, 1979.

Opinions Below

This matter arises under 42 U.S.C. 1651-54, the Defense Base Act.

The decision and Order of the Administrative Law Judge was entered on June 16, 1976 and appears as Appendix C to this Petition. The Decision of the Benefits Review Board of the Department of Labor affirming in part the Decision of the Administrative Law Judge and dated February 7, 1977, appears as Appendix B hereto. The judgment and opinion of the Sixth Circuit Court of Appeals; decided May 1, 1979 dismissing the Petition for Review for want of jurisdiction has not been officially reported but is printed as Appendix A hereto.

Jurisdiction

The judgment of the Sixth Circuit Court of Appeals was entered on May 1, 1979 (A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

(1) Did the Circuit Court of Appeals properly reject jurisdiction under a literal reading of 42 USC 1653 (b)?

(2) Did Congress intend to separate and isolate the Defense Base Act from the 1972 Amendment and Restructuring of the LHWCA so as to bar parties to a claim under said Act from the adjudicatory process created by said amendments and the only one in existence thereafter?

(3) Did the Circuit Court of Appeals err in permitting the new adjudicatory procedure created under the 1972 amendments to the LHWCA to be utilized in claims under the Defense Base Act and yet relegate such parties to the prior obsolete non-existent judicial review procedure be-

cause of the Congressional omission to change the language in 42 U.S.C. 1653 (b)?

(4) Did the 1972 amendments to the LHWCA, insofar as they restructured the adjudicatory and judicial review proceedings, repeal by implication the reference in 42 USC 1653 (b) to Federal District Courts?

(5) Assuming arguendo the validity of the Sixth Circuit determination is the Administrative Law Judge and the Benefits Review Board deprived of subject matter jurisdiction in this instance?

Federal Statutes Involved

(A) 33 U.S.C. 919 (a) prior to 1972 amendment, 86 Stat. 1261.

> (a) The deputy commissioner shall have full power and authority to hear and determine all questions in respect to such claim.

(B) 33 U.S.C. 919 (d) (as amended *supra*):

> (d) Notwithstanding any other provision of this chapter, any hearing held under this chapter shall be conducted only in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a hearing examiner (later designated as Administrative Law Judge) qualified under section 3105 of that Title. All powers, duties and responsibilities vested by this chapter on October 27, 1972, in the deputy commissioners with respect to such hearings, shall be vested in such hearing examiners.

* * * * * *

(A) 33 U.S.C. 921 (b) (prior to 1972 amendments)

> (b) If not in accordance with law, a compensation

order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

(B) 33 U.S.C. 921 (b) (as amended 1972)

(b) (1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. * * *.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred * * *.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

* * * * * *

42 U.S.C. 1653 (b) (Defense Base Act)

(b) Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this chapter shall be instituted in the United States District

Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurred.

Relevant Federal Rules

20 C.F.R. Part 701—Subchapter A—Longshoremen's and Harbor Workers' Compensation and Related Statutes.

Section 701.101 Scope of this subchapter and Subchapter B.

This subchapter contains the regulations governing the administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, the Defense Base Act (DBA), the District of Columbia Workmen's Compensation Act (DCCA), the Outer Continental Shelf Lands Act (OCSLA) and the Nonappropriated Fund Instrumentalities Act (NFIA) and such other amendments and extensions as may hereinafter be enacted.

701.102 Organization of this subchapter Part 701 is intended to regulate the administration of the LHWCA and its extensions. The regulations governing the LHWCA apply to all its extensions except where otherwise

noted. Part 704 contains the exception from these rules for the DBA, etc.

701.202 Transfer of functions

All functions with respect to administration of benefits under D.B.A. transferred to Department of Labor office of Workers' Compensation Programs.

701.301 Definitions and Use of Terms

(a) As used in this subchapter, except where the context clearly indicates otherwise.

(1) "Act" means the Longshoremen's and Harbor Workers' Compensation Act, as amended and includes those provisions of any statutory extension of such Act.

20 C.F.R. Part 801 Establishment and Operation of Benefit Review Board

801.2 (1) includes all the extensions to LHWCA noted *supra.*

801.102 Review authority

(a) The Benefits Review Board is authorized to hear and determine appeals from decisions or orders under (1) (LHWCA): (2) The Defense Base Act (DBA) 42 USC 1651 et seq. * * * C F R Part 802 Rules of Practice and Procedure

802.101 (b) The Rules promulgated apply to all appeals taken from decisions or order under LHWCA: DBA, etc.

802.403 Issuances of decisions

(a) The Board shall issue a written decision which must indicate that availability of judicial review of such decisions under LHWCA 921 (c) (see supra).

802.410 Judicial Review of Board Decision Within 60 days after a decision by the Board has been filed, any party may take an appeal to United States Court of Appeals pursuant to 33 U.S.C. 921 (c) (supra). 20 C.F.R. Part 704 Special Provisions of LHWCA Extensions

704.001 Extension covered by this Part (a) Defense Base Act (DBA)

704.002 Scope of Part

The regulations governing the administration of LHWCA as set forth in (Part 702 and 703 shall govern Part 704 including the Defense Base Act except for inconsistent provisions in 704.

704.151 DBA endorsement

All insurance policies under DBA shall include that all rules, regulations, etc. under LHWCA shall be abided by.

Statement of the Case

A. Procedural History

The within case was commenced by the widow-respondent herein filing a claim for death benefits under the Defense Base Act (DBA) for the death of her husband while working on a government project at the United States Naval Base in Guantanamo Bay, Cuba, as an employee of Lee Electric Company (Lee) a subcontractor of Heyl & Patterson International Inc. (Heyl). Upon the rejection of liability by Home Indemnity Co., insurer for Lee, formal hearings were held before an Administrative Law Judge in accordance with 33 U.S.C. 919(b), as amended. The Administrative Law Judge held Home Indemnity primarily liable and Travelers Insurance Co. (insurer for Heyl) secondary liable.

Thereupon, Home and Travelers each appealed the decision of the Administrative Law Judge to the Benefits Review Board under the authority of 33 U.S.C. 921 (b) (3), as amended, and 20 C.F.R. 801.102. The Benefits Review Board affirmed the decision against Home and reversed the finding of liability against Travelers.

Home sought a judicial review of the decision of the Benefits Review Board by taking an appeal to the United States Circuit Court of Appeals, Sixth Circuit, under the authority of 33 U.S.C. 921 (c), as amended by 86 Stat. 1261, 1262 (1972), and 20 C.R.F. 701.101, 701.102, 701.303, 801.2 (1), 802.101, 802.410, and Part 704 (all made part of the appendix attached hereto).

B. Decision Below Sought to Be Reviewed on Certiorari

The Circuit Court of Appeals, in its decision handed down and filed May 1, 1979 (set forth at length in Appendix A attached hereto), dismissed the appeal on the ground that it did not have jurisdiction over the appeal taken by petitioners under the authorities above enumerated.

In essence, the Court, although admitting that the Defense Base Act makes applicable the provisions of the Longshoremen's Act, insisted that since, among the widespread overall reconstruction of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), the applicable Code of Federal Rules, and the various Acts deemed legislatively to be extensions of the LHWCA, Congress overlooked 42 U.S.C. 1653 (b) relating to judicial review under the Defense Base Act (DBA), Congress intended to relegate parties thereunder to proceeding in a District Court to seek *a review of the Benefits Review Board.*

Reasons for Granting the Writ

I. The decision of the Circuit Court of Appeals herein creates a vacuum in the procedural rights of parties under the DBA and thereby deprives all parties of their right to due process under the Defense Base Act.

If the decision of the C.C.A. is carried out to its fullest consequence, a person claiming under the DBA would have no administrative machinery available to adjudicate his claim. The C.C.A. errs in holding, in effect, that the new procedural steps created by the 1972 amendments are available under the Defense Base Act to the parties only up to the right to a judicial review, as provided under 33 USC 921 (c) and 20 C F R 801.102, 802.410, 704.001. It erroneously holds that an aggrieved party under the DBA must seek a review of a decision of the Benefits Review Board in a District Court under a literal construction of 42 U.S.C. 1653 (b), which for some unknown reason was not reworded, within the massive amendatory action taken by Congress in 1972 which instituted an entirely new adjudication procedure under the LHWCA *and all its extensions.*

This conclusion creates an anomalous situation because 42 U.S.C. 1653 (b) (DBA) refers to review of a decision of a *Deputy Commissioner*, who, prior to the 1972 amendments, had been authorized to hold hearings and make decisions (former 33 U.S.C. 919). However, since 1972, a Deputy Commissioner is forbidden to hold hearings and is restricted to administrative duties (33 U.S.C. 919, as amended). A claim under the DBA cannot be heard by a Deputy Commissioner (see 5 U.S.C. 3105). The flaw in the Court's logic in holding that parties herein are confined under the DBA to a review by a district court, is obvious when, under the unamended statutes, the district court could only review orders and decisions of Deputy Commissioners and who under the 1972 amendments can perform only administrative duties.

By holding that in the wide ocean of the 1972 reform and reconstruction, the one little island represented by 42 U.S.C. 1653 (b) has been left untouched, the Court has created an unrealistic environment. Either all of the 1972 amendments apply, or none of them do. By bifurcating the effects of the 1972 amendments, the Court has in effect deprived all parties under the Defense Base Act of any legal redress. This result is further complicated by the fact that under the 1972 amendments the jurisdiction of the federal district courts in connection with the LHWCA *and its extensions*, including the DBA, has been expressly limited by Congress to the enforcement of compensation orders (33 U.S.C. 921 (d) as amended).

Moreover, the decision objected to herein is diametrically contrary to the provisions of 20 CFR, enacted under the authority of law, Sections 701.101, 701.102, 701.301, 704.001, 704.002, 801.2 (1), 801.102 (a), 802.101 (b), 802.410. As set forth at length in Appendix F, attached hereto, *all* claims under the DBA after October 27, 1972, in all their aspects and stages, are intended to be adjudicated under all the amendments to the LHWCA.

The fact that the 1972 amendments were intended by Congress to apply without exception to the LHWCA and all its extensions can be seen from the definitions of the word "Acts" appearing throughout the various sections, as expressly including the Defense Base Act.

The Court's attempted justification of rejecting jurisdiction by relying on the unchanged language in 42 U.S.C. 1653 (b) as allegedly indicative of Congress' intent to isolate it from all other amendments is error, since the only purpose of 42 U.S.C. 1653 (b) even prior to 1972 was not to grant jurisdiction to the district courts but only to prescribe the proper venue.

II. The construction of 42 U.S.C. 1653 (b) as laid down by the C.C.A. herein would cause injustice and produce incongruous and anomalous results, an intent which should not be ascribed to Congress and which should be avoided if possible.

Under all the basic canons of statutory construction, it has been held that, where it is possible to do so, it is the duty of the Court, in the construction of statutes, to harmonize and reconcile laws, and procedural statutes especially should be given that construction which will preserve the essentials of harmony and consistency in the judicial system.

More specifically, it has been held that where an Act provides for procedures that do not exist any longer, such Act becomes inapplicable (*Duncan* v. *Smith*, 262 SW 2d [373 Ky., 1954] 42 ALR 2d 754, 761). This principal of law is especially relevant to the facts in this appeal. Although the Court of Appeals relied expressly on a literal reading of the Defense Base Act (42 U.S.C. 1653 [b]), it ignored the language which read in part: "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act * * *.

Since Section 1653 aforesaid was enacted in 1941 (c. 357, Section 3, 55 Stat. 623), Congress in enacting that section was obviously referring to Sections 18 [default in payment] and 21 [review of compensation orders] *as it then read.* However, since these two latter sections were repealed in 1972, Section 1653 of the DBA would have no meaning unless it now was intended that the language should refer to Sections 18 and 21 of the LHWCA as it was constituted after the 1972 amendments. Section 21 of the LHWCA is the very section which created the Benefits Review Board and provided that

> "(c) Any person adversely affected or aggrevied by a final order of the Board may obtain a review of that order in the United States court of appeals * * *".

Therefore, in order to carry out the obvious intent of Congress to completely revise the entire procedural system under the LHWCA and all its statutory-extensions it must be deemed that 42 U.S.C. 1653 (b) was repealed by implication by the 1972 amendments to the LHWCA and 20 FCR, Part 700 et seq. There is no rule which would prohibit this conclusion, especially where irreconcilability would arise between the new procedures under the LHWCA (as a general law) and the old procedures under the LHWCA as incorporated in the DBA (*Petri* v. *Creelman Lumber Co.*, 199 U.S. 487, 479-498 (1905)). This repeal by implication also exists under the statutory construction principle that a statute valid when enacted may become invalid by change in the conditions to which it is to be applied (*Nashville C & St. Ry.* v. *Walters,* 294 U.S. 405, 415 (1934)).

III. The Circuit Court of Appeals for the Sixth Circuit has rendered inconsistent decisions on the same subject, creating improper confusion and uncertainty.

Although the Court below in the case at bar held that LHWCA Section 921 (a) as amended "is not applicable

to the present claim brought under the auspices of the Defense Base Act" (a statement directly contrary to the clear statutory mandates, *supra*) nevertheless, in *Director OWCP* v. *Eastern Coal Corporation,* 561 F. 2d 632 (1977), the same Court held that the Benefits Review Board and it had jurisdiction to hear appeals in Black lung cases. In that 1977 decision, the Court went into a lengthy detailed justification for their holding that the adjudicatory procedures in all of the statutory extensions of the LHWCA were amended by the Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972, stating, in part at page 638:

> "Of greater significance, however, is the fact that beyond dispute Congress regarded the new adjudicatory provisions of the Longshoremen's Act Amendments of 1972 as replacement for outmoded and unsatisfactory past methods of review (writs of mandamus in the United States District Courts and subsequent appeals to the United States Court of Appeals). In addition, Congress clearly intended to employ the new adjudicatory provisions of the Longshoremen's Act Amendments of 1972 as the method of review of a considerable number of workmen's compensation acts other than the Black Lung Benefits Act. We thus deal here with one of a number of enactments which are in pari materia and, hence, should, if there is doubt as to proper construction, be construed together." (Emphasis supplied)

Concluding at page 639:

> "Here the relevant statutes were all adopted by the Congress of the United States and all deal with the same general subject—the provision of workmen's compensation in employment areas where Congress has assumed particular concern and responsibiliy.
>
> The statutes we deem relevant to our present prob-

lem include "1) The Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972, supra; 2) The Black Lung Benefits Act of 1972, supra; 3) The Defense Base Act, 42 U.S.C. Sections 1651-54 (1970); 4) The Outer Continental Shelf Lands Act, 43 U.S.C. Section 1333 (c) (1970); and 5) The Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. Sections 8171-73 (1970).

What we deduce from these statutes is that Congress has decided to employ the Longshoremen's Act as the basic procedural vehicle for workmen's compensation claims."

Since the Court now takes a different view of the scope and breadth of the 1972 amendments to the LHWCA, insofar as it relates to the extension statutes, it has created a state of uncertainty and confusion which must be resolved by this Court.

IV. This case presents a significant federal issue which has not been previously passed upon by this Court.

The Defense Base Act was enacted to protect the lives and welfare of any employee engaged in any employment at any military, air or naval base acquired from any foreign government, upon any lands occupied or used by the United States for military or naval purposes in any territory or possession outside the continental United States, upon land outside the continental United States by an American employer providing benefits for the Armed Forces, etc. (42 USC 1651). This protection encompasses the lives and welfare or innumerable employees and their dependents. If the decision of the Court of Appeals, Sixth Circuit, in the instant case is permitted to stand without review by this Court, the rights of a large class of persons will be either foreclosed, or at the least, left in a state of doubt.

This Court has not previously passed upon the issue presented herein; and its national significance cannot be and should not be minimized both to employers and employees and their families.

V. As the Director, OWCP, has noted in his motion to reform the caption of this case, the determination of the Court is likely to impede a proper administration of claims arising out of injuries working at defense bases. (Appendix E).

In fact, the Court's Decision goes beyond that point. The Court took great pains to delineate the fact that judicial proceedings under the Defense Base Act could only be instituted in the District Court of the judicial district wherein is located the Office of Deputy Commissioner whose Compensation Order is involved.

The Court overlooked the inescapable fact that this matter did not involve a judicial proceeding vis-a-vis a Deputy Commissioner's Order.

By virtue of 20 CFR Section 702.311-702.312, a Deputy Commissioner is empowered only to resolve disputes in an informal manner. He may only issue a Compensation Order at the conclusion of a conference at the request of a party, when there is agreement on all matters with respect to a claim 20 CFR 702.315.

Where there is disagreement after informal conference, a Deputy Commissioner may issue a recommendation to the parties. If this is not accepted by a party, a formal hearing may be requested and the matters are transferred to the Office of the Chief Administrative Law Judge 20 CFR Section 702.316, 702.317 and 702.331.

A determination by an Administrative Law Judge can then be appealed by a party to the Benefits Review Board. 20 CFR 702.391.

Petitioner herein followed the mandated procedure. It filed a Petition for Review from the determination of the Benefits Review Board.

The Code of Federal Regulations contains no provision for appeal of a Deputy Commissioner's Compensation Order since he may issue one only where all parties agree. Consequently, it would appear, that given the instant decision neither administrative nor judicial review is possible. This presents a veritable "Catch 22" anomaly.

If the reasoning of the Sixth Circuit is correct, then it becomes at least doubtful that an Administrative Law Judge, and without doubt, that the Benefits Review Board can ever have subject matter jurisdiction of a claim for workers' compensation benefits arising out of the Defense Base Act; although the clear intent of the Congress is to the contrary.

This jurisdictional impasse presents a serious problem of claims processing to those individuals who are presently at work at numerous defense bases throughout the world and not merely to the present parties. Under such circumstances a resolution of the conflict is proper and necessary.

> *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 489, 71 S. Ct. 453 (1951).

In addition similar proscription of procedure would fall upon those claims processed under 5 U.S.C. 8171 NIFA by reason of the fact that language similar, in reference to judicial proceedings, in the Defense Base Act, appears therein.

The net effect of the decision of the Sixth Circuit Court of Appeals is to render any evaluation of a claim, by the Benefits Review Board, arising under DBA or NFIA, null and void.

The issue of subject matter jurisdiction, though somewhat peripheral to the basic issue herein, is a fit one for this Court's consideration. This peripheral issue can be considered by the Supreme Court, sua sponte, even in the instance in which that question was not or even not, properly raised by the parties.

> *McKinney* v. *Carroll*, 37 U.S. 6 (1838);
> *Mallett* v. *North Carolina*, 181 U.S. 89, 21 S. Ct. 730 (1901).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH F. MANES
Finney Farm
Croton-on-Hudson, N. Y. 10520
Attorney for Petitioner

Appendix A—Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit Entered May 1, 1979.

No. 77-3136

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION for Review of Decision of Benefits Review Board of the Department of Labor

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THE HOME INDEMNITY COMPANY,
Petitioner,

v.

BARBARA A. STILLWELL,
Respondent,

and

R. E. LEE ELECTRIC COMPANY,
Respondent,

and

HEYL & PATTERSON, INTERNATIONAL, INC.,
Respondent,

and

TRAVELERS INSURANCE COMPANY,
Respondent.

Decided and Filed May 1, 1979.

Appendix A—Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit Entered May 1, 1979.

Before: CELEBREZZE, KEITH and MERRITT, Circuit Judges.

CELEBREZZE, Circuit Judge. This case is before the court on a petition to review a decision of the Benefits Review Board of the Department of Labor (Board). The Board's decision affirmed a decision and order of an administrative law judge (ALJ) finding petitioner, The Home Indemnity Co., liable for death benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act[1] made applicable in the present case by the Defense Base Act.[2] For the reasons stated below, this Court is without jurisdiction to review the present case and accordingly, the petition of review must be dismissed.

On December 9, 1970, Heyl & Patterson International, Inc. (Heyl) entered into a contract with the United States Navy for the installation of an electrical power system at the United States Naval Base, Guantanamo Bay, Cuba. The agreement contained a clause requiring Heyl to provide workmen's compensation for its employees as is required by the Defense Base Act and to contractually require any subcontractor to provide workmen's compensation insurance for its employees. Heyl provided coverage for its workers through the Traveler's Insurance Company.

On May 11, 1971 Heyl entered into a subcontract with the Robert E. Lee Electric Company (Lee) for the completion of a portion of the work at Guantanamo Bay. The decedent, Jackie J. Stillwell, was an employee of Lee and assigned to work on the project at Guantanamo Bay. On July 25, 1973, Jackie J. Stillwell received a high voltage

[1] U.S.C. §§ 901-50. Hereinafter "Longshoremen's Act."

[2] 42 U.S.C. §§ 1651-54. Hereinafter "Defense Base Act."

Appendix A—Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit Entered May 1, 1979.

shock while working on the Guantanamo Bay project and died as a result thereof the following day. Lee secured workmen's compensation coverage through the petitioner, Home Indemnity.

The decedent's widow, respondent Barbara A. Stillwell, filed a timely claim for death benefits under the provisions of the Longshoremen's Act made applicable instantly by the Defense Base Act. Home Indemnity denied liability for the claim asserting that it did not provide Lee with insurance coverage for Guantanamo Bay. The matter was submitted to an ALJ for a formal hearing in accordance with 33 U.S.C. § 919(b). The ALJ found that Home Indemnity, through the representations of its authorized agent, did provide insurance coverage for Lee's work at Guantanamo Bay and that Home Indemnity was primarily liable for the payment of benefits to Mrs. Stillwell. The ALJ also found Traveler's Insurance Co. secondarily liable for the benefits claim.

Home Indemnity and Traveler's Insurance Co. appealed from the ALJ decision to the Benefits Review Board pursuant to 33 U.S.C. § 921(b)(3). The Board affirmed the decision of the ALJ finding Home Indemnity liable for the payment of benefits, but reversed the finding that Traveler's Insurance Co. was secondarily liable for the benefits claim. Home Indemnity seeks review in this court of the Board's decision pursuant to 33 U.S.C. § 921(c).

From an exacting review of the jurisdictional statutes involved and the interrelationship of the Longshoremen's Act with the Defense Base Act, it becomes apparent we do not have jurisdiction.

The Longshoremen's Act was enacted by Congress in 1927 for the purpose of insuring that every person engaged in maritime employment received workmen's compensation coverage. The Act provides that the employer is re-

sponsible for securing the payment of compensation payable under the Act to its employees.[3] In 1941 Congress enacted the Defense Base Act. The Defense Base Act makes applicable the provisions of the Longshoremen's Act, with certain modifications, to a number of employment relationships, including work performed upon the United States Naval Base, Guantanamo Bay, Cuba.[4]

One of the modifications of the Longshoremen's Act made by the Defense Base Act concerns judicial review of compensation orders. 42 U.S.C. § 1653(b) governs judicial review of compensation orders under the Defense Base Act and provides:

> Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this chapter *shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district,* and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs. (Emphasis added.)

The above staute is unambiguous and it clearly requires judicial proceedings to review a compensation order made pursuant to the Defense Base Act to be conducted in the United States district court of the judicial district where the office of the appropriate deputy commissioner is located. The Defense Base Act does not provide for direct review of compensation orders in the court of appeals.[5]

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[3] 33 U.S.C. § 904.

[4] 42 U.S.C. § 1651 provides in pertinent part:

> (a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—
>
> (1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or
>
> (2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or
>
> (3) upon any public work in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

[5] In response to respondents' motion to dismiss this appeal for a lack of jurisdiction, counsel for petitioner cited this court to 42 U.S.C. § 1653 as controlling the jurisdictional question. Counsel cited the statute in the following manner:

> § 1653 42 U.S.C.(B) provides in part that "Judicial proceedings provided in Sections 18 and 21 of 33 U.S.C. § 901 et seq. in respect to a compensation order made pursuant to this Act, shall be instituted in the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved" — —.

The statute correctly reads as follows:

> Judicial proceedings provided under sections 18 and 21

(footnote continued on following page)

Prior to 1972 judicial review of compensation orders under the Defense Base Act and the Longshoremen's Act was properly sought in the appropriate district court.[6] In 1972 Congress amended the Longshoremen's Act to its current form creating another level of administrative review, the Benefits Review Board,[7] and providing for direct review of the Board's decisions in the court of

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(footnote continued from preceding page)

> of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this chapter shall be instituted in the *United States district court* of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs. (Emphasis added.)

Counsel failed to cite that portion of the statute referring to "the United States district court." Counsel also failed to indicate, through the use of an ellipsis or other means, the omission in the citation. *Cf.* DR 7-102(A)(5); DR 7-106(B)(1) ABA CODE OF PROFESSIONAL RESPONSIBILITY.

[6] *Compare* 42 U.S.C. § 1653(b) *with* the prior version of 33 U.S.C. § 921(c). The prior version of 33 U.S.C. § 921(c) provided in pertinent part:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District).

Pub. L. No. 69-803 § 21(b), 44 Stat. 1436 (1927).

[7] 33 U.S.C. § 921(b).

appeals.[8] Congress did not, however, whether through legislative oversight or intent, amend the judicial review provisions of the Defense Base Act. Accordingly, we are bound to apply the current statutory scheme until Congress dictates otherwise.

Petitioner's reliance on 33 U.S.C. §.921(c) as authority for the existence of jurisdiction in this court to review the instant petition is misplaced for two reasons. First, § 921(c) is the judicial review provision of the Longshoremen's Act and it is not applicable to the present claim brought under the auspices of the Defense Base Act. 42 U.S.C. § 1653(b) governs judicial review of Defense Base Act claims. Further, from a reading of the statute it becomes clear that § 921(c) is inapplicable to the case at bar. Section 921(c) provides that "any person adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States court of appeals for the circuit in which the injury occurred . . . ." Guantanamo Bay, Cuba, not included in any judicial circuit. More particularly, for our purposes, Guantanamo Bay is not in the Sixth Circuit. Therefore, if we apply § 921(c) as the petitioners suggests, judicial review of the case in any forum may be foreclosed.

Under the current statutory scheme the compensation order in the present case is reviewable in the appropriate United States district court pursuant to 42 U.S.C. § 1653(b). Accordingly, the petition for review is dismissed.[9]

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[8] 33 U.S.C. § 921(c), as amended in 1972:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

[9] In light of our disposition of this case on jurisdictional grounds we render no opinion on the merits of the petition for review.

Appendix B—Decision of the Benefits Review Board of the Dept. of Labor dated February 7, 1977.

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

Washington, D.C. 20210

Filed as part of the Record
FEB 7 1977
(date)

Susan Rambo
(Clerk)

Benefits Review Board
BRB Nos. 76-311,
76-311A, 76-311B
and 76-311C

DECISION

BARBARA A. STILLWELL
(Widow of JACKIE J. STILLWELL)

Claimant
Petitioner/Respondent

v.

THE HOME INDEMNITY COMPANY

Carrier for Employer
Petitioner/Respondent

and

Appendix B—Decision of the Benefits Review Board of the Dept. of Labor dated February 7, 1977.

HEYL & PATTERSON INTERNATIONAL, INC.

General Contractor
Petitioner/Respondent

and

TRAVELERS INSURANCE COMPANY

Carrier for General
Contractor
Petitioner/Respondent

and

R. E. LEE ELECTRIC COMPANY

Employer/Respondent

Appeal from the Decision and Order of Russell M. King, Jr., Administrative Law Judge, United States Department of Labor

Jack J. Garris, Ann Arbor, Michigan, for the claimant. Joseph F. Manes, New York, New York, for the employer's carrier.

Charles F. McKenna (Strassburger and McKenna), Pittsburgh, Pennsylvania, for the general contractor.

James F. Jordan (Carr, Jordan, Coyne and Savits), Washington, D. C., for the general contractor's carrier.

Harold A. Siegel, Greenbelt, Maryland, for the employer.

Before: Washington, Chairperson, Hartman and Miller, Members:

Appendix B—Decision of the Benefits Review Board of the Dept. of Labor dated February 7, 1977.

These are appeals by the claimant, the employer's carrier, the general contractor and the general contractor's carrier from a Decision and Order (75-LHCA-388) of Administrative Law Judge Russell M. King, Jr., pursuant to the provisions of the Longshoremen's and Harbor Workers' Co pensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter the Longshore Act) as extended to the Defense Base Act, as amended, 42 U.S.C. § 1651 *et seq.* (hereafter, the Act).

The United States Navy contracted with Heyl & Patterson International, a general contractor, for the installation of an electrical power station at Guantanamo Bay, Cuba On May 11, 1971, Heyl & Patterson subcontracted a portion of that work to R. E. Lee Electric Company (hereafter, Lee). The claimant's late husband, an employee of Lee, died on July 26, 1973, as a result of a work-related electrical shock suffered the previous day while assisting on the installation project at Guantanamo Bay.

The administrative law judge found that the death is compensable; that the widow and children are entitled to benefits under the Act; that Lee, the employer and subcontractor, and Heyl & Patterson, the general contractor, were insured for this death pursuant to Section 32(a), 33 U.S.C. § 932(a), of the Longshore Act, with The Home Indemnity Company and the Travelers Insurance Company, respectively, by means of valid workers' compensation insurance policies; and that Lee and Home are jointly and primarily liable for payment of benefits, and Heyl and Travelers are jointly and secondarily liable pursuant to Section 4(a) of the Longshore Act, 33 U.S.C. § 904(a). The administrative law judge ordered payment of all benefits for the surviving widow and dependent children, funeral expenses, interest, penalty and attorney's fees.

Appendix B—Decision of the Benefits Review Board of the Dept. of Labor dated February 7, 1977.

The Home Indemnity Company appeals (BRB No. 76-311) on the issue of whether there is substantial evidence to support the finding that insurance coverage was afforded Lee under the Defense Base Act by Home. Heyl & Patterson appeals (BRB No. 76-311A) on the issues of whether, in light of the employer's valid insurance contract as ascertained below, the general contractor is liable for benefits under Section 4(a), 33 U.S.C. § 904(a), of the Longshore Act; and if the general contractor is liable, whether the claimant has a lien against its assets in light of the general contractor's insurance policy. The claimant appeals (BRB No. 76-311B) on the issue of whether a successful claimant's attorney can recover necessary and reasonable travel expenses as costs under Section 28(d) of the Longshore Act, 33 U.S.C. § 928(d). Travelers appeals (BRB No. 76-311C) on the issue of whether there is substantial evidence to find that Travelers is jointly and secondarily liable with Heyl & Patterson for benefits under the Act.

The employer's carrier, Home, contends that it did not enter into a valid contract for insurance of employer Lee's workers' compensation liability under the Defense Base Act.

The scope of the Board's review is limited. If the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational, and are consistent with applicable law, the order must stand. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith Associates,* 380 U.S. 359 (1965). We are not empowered to usurp his fact-finding prerogatives merely because the evidence is inconsistent and conflicting or because it permits the drawing of other and contrary inferences. *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U.S. 469 (1942).

The evidence reveals that Home through its agent, Rutherfoord Bonding and Insurance Company, had con-

tracted with Lee to provide workers' compensation insurance at least as early as May 24, 1971. This contract was renewed annually without substantive change and was in effect on the date of decedent's injury. The contract contains a Condition 13 which states in pertinent part that ". . . the terms of this policy [shall not] be waived or changed, except by endorsement issued to form a part of this policy, signed by an authorized representative of the company." On February 17, 1972, Ernest E. DeConti, an authorized representative of Home, sent Lee a copy of a letter to verify workers' compensation coverage applicable to ". . . the job Electrical Power Systems, Naval Air Station, Guantanamo Bay, Cuba." The letter was sent in response to Lee's request for a Defense Base Act endorsement as required by his general contractor, Heyl & Patterson. DeConti was also a manager of Rutherfoord Bonding and Insurance Company and has personally assisted in servicing the Lee insurance account. Home alleged that DeConti did not have authority to bind such coverage and that the policy in fact did not cover Defense Base Act claims. The administrative law judge found that Lee properly relied on the principal-agent relationship of DeConti with Rutherfoord and with Home. Having received the letter verifying coverage, Lee had no reason to explore further, the judge found.

In view of this evidence, and after a careful review of the entire record in this case, we hold that there is substantial evidence to support the conclusion below that Home had afforded Lee Defense Base Act coverage applicable to this injury and that such conclusion is rational and in accordance with law. We therefore affirm that conclusion.

Heyl & Patterson next appeal contending that the subcontractor, having secured payment of workers' compensation claims pursuant to Section 32(a) of the Longshore

Act, 33 U.S.C. § 932(a), as ascertained below, the general contractor is exempt from liability under Section 4(a), 33 U.S.C. § 904(a). We agree with the general contractor's position.

Section 4(a) clearly provides that the general contractor is liable for workers' compensation benefits *unless* the subcontractor has secured payment of the benefits. The administrative law judge has found, and the record supports a finding, that Lee, the subcontractor, had properly secured payment according to the provisions of Section 32(a) of the Longshore Act. Accordingly, the general contractor, and its carrier, are not liable for the payment of benefits in this case. *Probst* v. *Southern Stevedoring Company*, 379 F. 2d 763 (5th Cir. 1967). That portion of the Decision and Order below which finds Heyl & Patterson and Travelers liable is vacated. Other issues raised by these parties on appeal are therefore moot.

The claimant appeals contending that a successful claimant's attorney should be reimbursed under Section 28(d) of the Longshore Act, 33 U.S.C. § 928(d), for necessary and reasonable travel expenses.

For the convenience of other parties, claimant's attorney, resident of Ann Arbor, Michigan, agreed to have hearings in New York and Washington, D.C. As part of his fee application the attorney requested $622.50 to reimburse him for travel expenses to and from these hearings pursuant tc Section 28(d) of the Longshore Act. The administrative law judge found that there was no provision for attorney travel expenses under Section 28(d) and accordingly refused to grant reimbursement.

The language of Section 28(d) clearly refers only to costs and travel expenses of witnesses. It does not refer to an attorney's own travel expenses. However, where a claimant's attorney has incurred reasonable and necessary

Appendix B—Decision of the Benefits Review Board of the Dept. of Labor dated February 7, 1977.

travel expenses, in excess of that normally considered overhead, in the successful prosecution of a case, such expense may be considered by an administrative law judge in assessing an attorney's fee against the employer under Section 28(a). *Bradshaw* v. *J. A. McCarthy, Inc.*, 3 BRBS 195, BRB Nos. 75-209, 75-209A, 75-209B (Jan. 26, 1976), *aff'd*, 76-1146 (3rd Cir., Jan. 4, 1977). Therefore, we remand this case to the Office of Administrative Law Judges so that the travel expenses may be taken into consideration in the award of an attorney's fee.

Accordingly, the Decision and Order of the administrative law judge is affirmed in part, vacated in part, and remanded for a further determination consistent with this Decision.

JULIUS MILLER,
Julius Miller, Member

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 7th day
of February, 1977.

Appendix C—Decision and Order of the Administrative Law Judge Entered on June 16, 1976.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

Case No. 75-LHCA-388

OWCP No. 2-31733

In the Matter of

JACKIE J. STILLWELL (Deceaser),
Claimant

vs.

R. E. LEE ELECTRIC COMPANY
Employer (Subcontractor)

HEYL & PATTERSON INTERNATIONAL, INC.
General Contractor

THE HOME INSURANCE COMPANY
Carrier for the Employer
(Subcontractor)

TRAVELERS INSURANCE COMPANY
Carrier for the General
Contractor

Appendix C—Decision and Order of the Administrative Law Judge Entered on June 16, 1976.

Jack J. Garris, Esquire
117 N. First Street
Ann Arbor, Michigan 48108

For the Claimant

Harold Aryai Siegel, Esquire
16 Maplewood Court
Greenbelt, Maryland 20770

For the Employer (subcontractor)

Charles F. McKenna, Esquire
Strassburger and McKenna
31 Grant Building
Pittsburgh, Pennsylvania 15219

For the General Contractor

Joseph F. Manes, Esquire
11 Park Place
New York, New York 10017

For the Carrier for the
Employer (Subcontractor)

James F. Jordan, Esquire
Carr, Jordan, Coyne & Savits
900 Seventeenth Street, N. W.
Washington, D. C. 20006

For the Carrier for the
General Contractor

Before: Russell M. King, Jr.
Administrative Law Judge

Appendix C—Decision and Order of the Administrative Law Judge Entered on June 16, 1976.

Decision and Order

Jurisdiction and Procedural History

This is a claim for death benefits, by the deceased's widow on her behalf and on behalf of her infant children, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, made applicable to this case by the Defense Base Act, 42 U.S.C. 165, *et seq.* (both hereinafter referred to as the "Act"). This case is before the undersigned Administrative Law Judge for formal hearing in accordance with § 19(d) of the Act.

Pursuant to due notice a hearing was held in Washington, D. C.[1] on June 23-24, 1975, in accordance with the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.* The Claimant's widow appeared in person and was represented by Jack J. Garris, Esq. of Ann Arbor, Michigan. The Employer (Subcontractor) was represented by Harold Aryai Siegel, Esq. of Greenbelt, Mayland, the General Contractor by Charles F. McKenna, Esq., of Pittsburgh, Pennsylvania, the Carrier for the Employer (Subcontractor) by Joseph F. Manes, Esq. of New York City, and the Carrier for the General Contractor by James F. Jordan, Esq. of Washington, D. C. No appearance was made by or on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Counsel were afforded full opportunity to adduce evidence, to call, examine and cross-examine witnesses and to

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[1] The deceased's widow presently resides in Indiana. The hearing was held in Washington, D. C. with her consent and at her request, by and through her counsel.

make oral argument. All parties have filed post-hearing memorandums of law which have been duly considered in this case. Counsel for the Claimant (widow) has also filed an application for an award of attorney's fees and costs (or expenses). This application has also been duly noted and considered in this case.

Issue

This case raises but one central issue, whether or not one or both Carriers are liable for payment of the death benefits due and which the Act requires their insureds to pay.

Stipulations of Parties

At the outset of the formal hearing, counsel for the parties stipulated and agreed that there was no dispute to the following matters. (Tr. 6-7).

1. That is this case, the Claimant has filed a timely application or claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act made applicable to this case by the Defense Base Act.

2. That on July 25, 1973, Jackie Jerome Stillwell sustained an injury by high voltage, which caused his death the following day, July 26, 1973.

3. That at the time of said injury, the deceased was an employee of the R. E. Lee Electric Company and working at and on the United States Naval Base at Guantanamo Bay, Cuba.

4. That on the date of said injury, the said R. E. Lee Electric Company, a Virginia corporation, was a subcontractor of Heyl & Patterson International, Inc., a Pennsylvania corporation.

5. That the deceased's injury and resulting death arose out of and in the course of his employment as defined within the terms of the Act.

6. That the Respondent-Employer, R. E. Lee Electric Company, had timely notice of the injury and resulting death on July 26, 1973.

7. That on the date of death of the said deceased, he was lawfully married to Barbara Ann Stillwell, who is today unremarried, and that three children were born of said marriage, namely, Jack Shannon Stillwell, born September 5, 1965, Phillep Arnold Stillwell, born November 2, 1970, and Douglas Jerome Stillwell, born February 4, 1972, and that further, all of said children are living and presently dependents of Barbara Ann Stillwell and in her care and custody.

8. That no benefits or compensation have been paid under the Act since the date of injury or date of death to the present time.

Summary of Evidence

Background

On December 9, 1970, Heyl & Patterson International, Inc. (hereinafter called "Heyl") entered into a contract with the United States Navy for the installation of an electrical power system at the United States Naval Base at Guantanamo Bay, Cuba. The contract contained the following provision regarding workmen's compensation insurance:

"The contractor, before commencing performance under this contract, shall provide and thereafter maintain Workmen's Compensation Insurance or security as required by the Defense Base Act, as amended (43

> U.S.C. 1651). The contractor further agrees to insert in all subcontracts hereunder to which the Defense Base Act is applicable, a clause similar to this clause, including this sentence, imposing on all such subcontractors a like requirement to comply with the Defense Base Act."

On May 11, 1971, Heyl entered into a subcontract agreement with R. E. Lee Electric Company, Inc. (hereinafter called "Lee") for completion of a portion of the work at Guantanamo. The deceased was employed by Lee in Guantanamo when he was injured on July 25, 1973 and died the following day. Lee's insurance needs were serviced through the Thomas Ruthorford Bonding and Insurance Company (hereinafter called "Rutherford"), agents for The Home Indemnity Company (hereinafter called "Home"). Heyl's insurance needs were serviced by Babb, Inc. (hereinafter called "Babb"), agents for the Travelers Insurance Company (hereinafter called "Travelers"). At the time of the accident and death in this case, Heyl and Lee had obtained, through Babb and Rutherford, workman's compensation insurance coverage from Travelers and Home, but for various reasons hereinafter set out, both carriers deny coverage under the Defense Base Act (42 U.S.C. 1651, *et seq.*), which applies coverage afforded under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*) to certain civilian workers (as the deceased here) when injured or killed on a United States defense base such as the U.S. Naval Base at Guantanamo, Cuba. The Act itself, in Section 4(a), places liability as follows:

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under [the Act]. In the case of any employer

> who is a subcontractor, the contractor shall be liable for and shall secure the payment of said compensation to the employee of the subcontractor unless the subcontractor has secured such payment."

The subcontractor agreement between Heyl and Lee provided that Lee would furnish certain "Insurance Requirement[s]," including "Workman's Compensation" in "Statutory Limits."

The Lee, Rutherford and Home Relationship

Ernest E. DeConti was manager of the Rutherford agency in 1973. He had been in the insurance business since 1959 and helped service the Lee account. Not only was the Rutherford agency itself an actual "agent" of Home, but several of its employees were individually actual "agents" of Home, including DeConti and Assistant Vice President James M. Egan. When Lee obtained the Guantanamo subcontract, its president notified the Rutherford agency and DeConti issued to Lee a Home policy incorporating the following clause:

> "To pay promptly when due all compensation and other benefits required of the insured by the workman's compensation law."

The policy further defined "workman's compensation law" as that of a "state", and defined "state" as "any State or territory of the United States of America and the District of Columbia." The face of the policy limited coverage to Virginia, Maryland and the District of Columbia, but the policy also contained an "all states endorsement" extending coverage to "any state" except 8 specifically listed states, including Alaska and Hawaii. DeConti, at

Lee's request, wrote Heyl on February 17, 1972,[2] confirming Home's coverage of Lee for "Workman's Compensation with Employers' Liability Coverage B limit of $100,000," further reciting that "[this coverage applies] to the job [at the] Naval Air Station, Guantanamo Bay, Cuba." Also by letter dated May 30, 1974 from Vice President Egan to Lee, the same coverage was verified as existing since May 24, 1971. Egan testified that the policy, as written, did not cover claims under the Defense Base Act and that, upon learning of the Stillwell claim and its denial by Home in October, 1973, he immediately "bound" coverage and issued an appropriate Defense Base Act endorsement soon thereafter.[3] According to Egan, and Lee's president, the Stillwell claim was the only claim filed during Lee's Guantanamo operations. The policy itself does not contain the words "Defense Base Act" and is obviously restricted to state coverage as recited earlier.

DeConti testified that he "was not aware of the work being performed [in Cuba]" and that he did not remember the circumstances which prompted the issuance of the coverage letter to Heyl of February 17, 1972, although he did indicate that "many times these contractors would request letters of this type prior or while they're negotiating with a company." DeConti also testified that he,

[2] The letter bears DeConti's signature although DeConti testified that his secretary actually signed it with his authorization.

[3] The record is unclear as to why this was not done initially, if needed for such coverage. However, the record does reflect that DeConti took a greater part than Egan in servicing the Lee account during the critical period. DeConti testified he found out about Lee's actual involvement in Cuba in February, 1973. Egan also claimed in testimony that home office approval (from Home) was needed to issue or bind Defense Base Act coverage. I accept this, however, as Egan's testimony only, and not as necessarily legal or binding precedent herein on matters pertaining to agency relationships, or actual or implied authority.

himself, did not have authority to "bind" coverage by Home under the Defense Base Act, indicating that to do so he would either have to call Egan or get permission direct from home.[4] The February 17th coverage letter to Heyl indicated, when referring to "workman's ccompensation," that "these coverages apply to the job [at the] Naval Air Station, Guantanamo Bay, Cuba." DeConti's testimonial attempts to square his Defense Base Act coverage stand with the language of the letter went as follows:

> "Okay. We're saying here that at the time we were of the opinion that he was negotiating. Or—we had written letters like this before. And this is, by no means—we're saying here, 'These coverages do apply.' We're not saying he has all of the coverage he needs."

DeConti further contended that it would have been improper for Heyl to rely on the coverage letter and that a "certificate of insurance," giving more specifics and dates, would have been the proper method of verifying the existance of exact and complete coverage.[5] DeConti described Lee and its president as an "excellent medium risk" company attentive to its insurance needs. He testified that it wasn't until February of 1973 that he knew of Lee's Guantanamo Bay involvement and in reply to the queery as to why he did not "bind" Defense Base Act coverage then, he simply stated "I don't know."[6] He had

[4] See footnote 3, supra. I treat DeConti's remark here in the same legal light as those of Egan, summarized earlier.

[5] DeConti's opinion here is acknowledged as his own and I treat it as such. Heyl's actions and its reliance on the letter will be treated later herein.

[6] According to DeConti, this coverage would not have required any additional premium.

"no recollection" of Lee's request to verify that he had adequate and proper coverage, or for that matter, any coverage.

DeConti was notified of the Stillwell claim soon after the accident in July of 1973. He testified that he thereafter "tried to push" the claim, or, in effect, obtain payment of the claim by Home even though he "was aware . . . that Guantanamo would not be covered." This seemingly inconsistent position was never clarified by DeConti in the record, except his testimony that it was "just a shot in the dark" for a customer, which "sometimes . . . works." DeConti, in any event, processed the claim, which was denied by Home for alleged lack of coverage. DeConti testified that he did suspicion that the loss would be sizable, "somewhere around $180,000-$200,000," judging from his prior experience with District of Columbia workman's compensation benefits.[7]

Robert B. Ware, Jr., had been a "casualty supervisor" for Home for 14 months, working out of the Richmond, Virginia office. He has worked for Home a total of 6 years. Ware testified that Home's "audit sheets"[8] for Lee indicated no payroll for work performed in Cuba and no billing for any coverage outside of Maryland, Virginia and the District of Columbia,[9] and during the period in ques-

[7] The policy in force at the time of the claim herein contains District of Columbia benefits. By Federal statute, the District of Columbia (as in the case of the Defense Base Act) assimilates the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended.

[8] These "audit sheets" were used by Home for year-end billing purposes.

[9] A more accurate term here would be "exposure." As indicated earlier herein, the Home's policy afforded "workman's com-

(footnote continued on following page)

tion. Ware thus concluded, in testimony, that Home did not know about Lee's Cuba work[10] which, according to him, would have necessitated or generated an additional premium.[11]

The Heyl, Babb and Travelers Relationship

Mr. Chandler G. Ketchum is Chairman of the Board of Babb, Incorporated and has been with Babb (or its predecesors) for 30 years. Ketchum testified that Babb had been an agent for Travelers for over 20 years and had, over the last 12 to 15 years, underwritten various coverages for Heyl with Travelers. Ketchum was familiar with Heyl's Guantanamo contract, had been given a copy of the contract and Babb furnished Heyl's performance bond through Travelers to the U.S. Navy on February 12, 1971. Regarding other insurance coverages, Ketchum testified as follows:

> "From the commencement of the work in Guantanamo, the Travelers were advised and coverage was extended, both a marine liability insurance *and the Longshoremen's Endorsement was added to the compensation policies.*" [Emphasis added].

(footnote continued from preceding page)

pensation" coverage not limited to Maryland, Virginia and the District of Columbia. Home's billing took into consideration "exposure," by considering among other things, payroll amounts, number of employees and jobs.

[10] I take this alleged lack of knowledge here to apply only to Home's office in Richmond, and to Ware himself. The ramifications of Rutherford's (or Home's agent's) knowledge, and the imputation of that knowledge to Home, will be treated later in this decision.

[11] DeConti, Home's agent and Rutherford's manager, testified to the contrary.

Ketchum stressed in his testimony that Heyl was covered throughout with "compensation policies containing . . . Longshoremen's and Harbor Workers' Endorsement[s]" and indicated that premiums were calculated and collected throughout for the coverage. Ketchum conceded that the policy contained no actual Defense Base Act endorsement, but indicated that on July 1, 1971, Babb wrote to Travelers as follows:

> "Enclosed is a copy of the insurance provisions[12] of a contract Heyl & Patterson may solicit. It seems to [us] their present coverage would encompass the requirements of the contract. Would you kindly review it and let me know if you foresee any need for additional coverage? Also enclosed is the insured's 'Notice of Contract Operations' for their work at the Naval Base at Guantanamo Bay, Cuba.'"[13]

Ketchum testified that he received no reply or response from Travelers regarding the letter and that he further (and personally) assumed that Heyl was covered under the Defense Base Act because of the lack of any such response and further because and by virtue of the existing "Longshoremen's Act Coverage." Ketchum also testified that if there had been an actual Defense Base Act Endorsement attached to Heyl's workmen's compensation policy, there would not have been any additional premium, and that Babb's intentions in writing to Travelers on July 7, 1971 was to "[i]nsure the interests of Heyl."

Evaluation of Stipulations, Evidence and Law and Initial Conclusions and Findings

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[12] The provisions required coverage under (and named) the Defense Base Act.

[13] A copy of the letter was introduced into evidence as Heyl & Patterson's Exhibit No. 1, without objection.

Section 4(a) of the Act initially and clearly places liability,[14] stating as follows:

> "Every *employer* shall be liable for and shall secure the payment . . . [of death benefits required in Section 9]. In the case of an *employer* who is a *subcontractor,* the *contractor* shall be liable for and shall secure the payment . . . [due from the] subcontractor *unless the subcontractor has secured such payment.*" [Emphasis added]

I conclude and find that Lee, as the employer, is primarily liable and that the provision of Section 4(a) of the Act imposing liability on the general contractor (Heyl in this case) in a secondary, protective one. *Probst* v. *Southern Stevedoring Company,* 379 F. 2d 763 (5th Cir. 1967). In the absence of payment by Lee (or on Lee's behalf), Heyl then becomes liable forthwith, and I so conclude and find herein. That is not to say that Heyl steps into the shoes of Lee, but Heyl's obligation becomes fixed and certain as an insurer or indemnifier, Lee always remaining primarily liable.

Now turning to the carriers here, I find that their agents lawfully and legally bound them to Defense Base Act coverage, and, for whatever it may be worth, I further find that Travelers, through inaction in failing to respond Ketchum's letter of July 1, 1971, in effect acknowledged coverage.

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[14] Liability of Lee and Heyl in the case was and is absolute and unquestionable. Priorities will be discussed later herein. This case also involves interest and penalties, and could involve fines and imprisonment under Section 32 of the Act. I thus chose here to express my curiosity in why Lee or Heyl (or both) failed to directly commence payments pending adjudication of their carrier's liability.

The acts of an agent, acting within his apparent scope, generally bind his principal. This legal premise is perhaps more settled in the law than any other, and where exceptions exists, they appear particularly rare in the field of insurance. DeConti and his company, Rutherford, were (and I so find) admitted "agents" of Home. DeConti and Rutherford were Home in the eyes of the law (as Babb, in effect was Travelers). Lee and Heyl relied on this relationship and had no reason to explore further. Since the insurance industry chooses to merchandise its product through brokers and agents, it must be responsible for their actions.

DeConti's actions, I find to be unexplainable. I can only conclude and find that he erred through inexperience. I do not credit his testimony where he claimed no knowledge of Lee's Guantanamo involvement until February of 1972. In February of 1971, DeConti wrote Heyl confirming "Workmen's Compensation [coverage for Lee applying] to the job [at the] Naval Air Station, Guantanamo Bay, Cuba." Moreover, if one accepted DeConti's testimony (which I do not), there remains the question of why then, did he not secured coverage. I conclude that DeConti either improperly and actually thought that the coverage existed or unexplainedly and improperly failed to secure coverage.

Lee's president, I conclude and find, properly relied on DeConti and Rutherford for adequate and necessary coverage and was lead by them to believe (and did believe, justifiably and properly so) that it was covered under the Act. I further and also conclude and find this to be the case with Heyl, as pertains to Lee's coverage described in the correspondence between Rutherford (and DeConti), and Heyl.[15]

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[15] There is no evidence in the record which would reflect any knowledge on the part of Babb or Travelers of Lee's coverage.

The Babb and Travelers relationship poses a slightly different situation but the outcome is the same. Heyl, I find, properly relied on Babb for the proper and necessary coverage, and was led to believe it was covered. In fact, Ketchum, Babb's long-time employee and Board Chairman, I conclude honestly thought coverage under the Act existed. Ketchum went so far as to send Travelers direct a copy of the required insurance provisions in the Navy contract, indicating that Babb felt Heyl was covered but to "let [them] if [they, meaning Travelers] foresee any need for additional coverage." I conclude and find that Babb's actions bound coverage under the Act by Travlers in favor of Heyl and that further, Travelers' failure to respond to Babb's letter of July 1, 1971 constituted an acknowledgement of such coverage by Travelers. I see here no improper conduct on the part of Babb or its employees.

Thus, and in summary, I conclude Lee and Home, and Heyl and Travelers are all liable in this case and in that order of priority, for the reasons above stated and based upon the records as a whole.

Individual and Further Findings of Fact and Conclusions of Law[16]

Further, and based upon the record as a whole, including the memorandum filed herein and other applicable law and authority, I hereby make the following further findings of fact and conclusions of law:

1. That Rutherford and DeConti were agents of Home and as such, had apparent or implied authority to bind

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[16] Also included here as Findings of Fact are the stipulations of the Parties, set out earlier herein. For the sake of brevity, they are not here and again restated.

coverage by Home of Lee's possible and potential obligations under the Act, and that Rutherford and DeConti did so in this case.

2. That Lee justifiably relied on Rutherford and DeConti for said coverage and in believing or concluding that it was covered under the Act.

3. That Heyl justifiably relied on Rutherford and DeConti in believing or concluding that Lee was properly covered by Home under the Act.

4. That Babb and Ketchum were agents of Travelers and as such, had apparent and implied authority to bind coverage by Travelers of Heyl's possible and potential obligations under the Act and that Babb and Ketchum did so in this case, and that further Travelers acknowledged said coverage.

5. That Heyl justifiably relied on Babb and Ketchum in believing or concluding that it was covered under the Act.

6. That under Section 4(a) of the Act, Lee, as the deceased's employer, is primarily liable in this case for the payment of funeral expenses and death benefits as provided in Section 9 of the Act, and further for the payment of necessary and appropriate fees, costs, interest and penalties as provided in the Act or by applicable or appropriate law or authority.

7. That as Lee's insurer and carrier, Home is equally, jointly and primarily liable for Lee's obligations as set out in paragraph 6, above, and further is so liable by virtue of and pursuant to Sections 32(a), 35 and 36(a) of the Act, and 20 C.F.R. Section 703.115.

8. That in the event the obligations as set forth in paragraph 6, above, are not secured and paid by Lee and Home, said obligations become due and payable forthwith by

Heyl pursuant to the provisions of Section 4(a) of the Act, or by Travelers as set out in paragraph 9, below.

9. That Heyl's insurer and carrier, Travelers is equally, jointly and primarily liable for Heyl's obligations as set out in paragraph 8, above, and further is so liable by virtue of and pursuant to Section 32(a), 35 and 36(a) of the Act, and 20 C.F.R. Section 703.115.

10. That the deceased's average weekly wages on the date of his death (July 26, 1973) were $329.38 per week.

11. That the deceased's funeral expenses exceeded $1,000.00 and that said expenses were reasonable, and for that the deceased's widow, Barbara Anne Stillwell, is entitled to be compensated for said expenses the amount of $1,000.00, as provided in Section 9(a) of the Act.

12. That the deceased's widow, Barbara Anne Stillwell, is entitled to be paid and receives death benefits in this case as provided in and by Section 9(b) of the Act, and that the deceased's children, Jack Shannon Stillwell, Phillip Arnold Stillwell and Douglas Jerome Stillwell, are entitled to additional death benefits in this case and as provided in and by Section 9(b) of the Act.

13. That as to benefits found payable in paragraphs 11 and 12, above, the arrearage should be payable forthwith in lump sums (as hereinafter Ordered) with interest at the rate of 6 percent per annum from the date of death until said arrearage is paid, and that in addition said benefits and sums should include the 10 percent penalty as provided in Section 14(e) of the Act.

14. That the benefits found due and payable in paragraph 12, above (including the arrearage due under Section 9(b) of the Act and mentioned in paragraph 13, above), should be subject to the adjustment provisions of Section 10(f) of the Act.

15. The attorney's fee of $5,000.00 for the services of Jack J. Garris, Esq., counsel for the widow of the deceased, is fair and reasonable and should be paid forthwith directly by the Respondents (Lee and Home, and Heyl and Travelers) in the order of priority above found, and pursuant to Section 28(a) and (c) of the Act, and further that the claim for travel expenses made herein should be denied, there being no provision for such in Section 28(d) of the Act.

16. That the Respondents, Lee, Home, Heyl and Travelers, are subject to Section 38(a) of the Act, providing for a fine of not more than $1,000.00, or by imprisonment for not more than one year, or both, upon conviction for failing to secure the payment of the death benefits due under the terms and provisions of the Act.

17. That all parties hereto have been, at all times relevant herein, and are subject to the Act.

ORDER

IT IS THEREFORE ORDERED:

1. That the Respondents[17] shall pay death benefits forthwith to the deceased's widow, Barbara Anne Stillwell, and to her on her account and on account of the deceased's three children, Jack Shannon Stillwell, Phillip Arnold Stillwell and Douglas Jerome Stillwell, said death benefits to be based on the average weekly wages of the deceased in the amount of $329.38 on the date of death (July 26, 1973), and said death benefits to commence on (and to be calculated from and as of) July 26, 1973 and to include funeral expenses in the amount of $1,000.00; said death benefits to be payable as provided for in Sections 9(a) and (b) of the Act.

[17] This term "Respondents" in this Order refers to Lee, Home, Heyl and Travelers. Where payments of any type are ordered, including interest and penalties, it applies to the Respondents and in the order of payment (or priority) found to be applicable herein (Lee and Home, and Heyl and Travelers).

2. That the arrearage due be paid forthwith by the Respondents (and as provided in paragraph 1, above) in one lump sum payment (including said funeral expenses), said payment to additionally include interest at 6 percent per annum (from July 26, 1973 until paid) and said payment to further and additionally include the 10 per centum (penalty) as provided in Section 14(e) of the Act.

3. That all death benefits and payments found due and ordered herein, including the arrearage but excluding said funeral expenses, shall be adjusted under the provisions of Section 10(f) of the Act.

4. That all death benefits and payments found due and ordered herein shall continue pursuant to Sections 9(b) and 10 (f) of the Act, until further order.

5. That in respect to past and future sums due under this Order, the deceased's widow, on her behalf and on behalf of the deceased's minor children, does and shall have a priority and protected lien on the assets of the Respondents Lee, Home, Heyl and Travelers), pursuant to the provisions of Section 17(a) of the Act.

6. That the Respondents shall pay forthwith and directly to Jack J. Garris, Esquire, the sum and amount of $5,000.00, the same representing reasonable attorney's fees found herein for his services (to date) on behalf of the deceased's widow and children.

RUSSELL M. KING, JR.
Russell M. King, Jr.
Administrative Law Judge

Dated: June 2, 1976
Washington, D. C.

Appendix D—Longshoremen's and Harbor Workers' Compensation Act, 20 C.F.R.

RULES IN THIS SUBCHAPTER

§ 701.101 Scope of this subchapter and Subchapter B.

This subchapter contains the regulation governing the administration of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, the Defense Base Act (DBA), the District of Columbia Workmen's Compensation Act (DCCA), the Outer Continental Shelf Lands Act (OCSLA), and the Nonappropriate Fund Instrumentalities Act (NFIA), and such other amendments and extensions as may hereinafter be enacted. The regulations governing administration of the Black Lung Benefits Program are in Subchapter B of this chapter.

§ 701.102 Organization of this subchapter.

This Part 701 is intended to provide a general description of the regulations in this subchapter, information as to the persons and agencies within the Department of Labor authorized by the Secretary of Labor to administer the Longshoremen's and Harbor Workers' Compensation Act and its extensions and the regulations in this subchapter, and guidance as to the meaning and use of specific terms in the several parts of this subchapter. Part 702 of this subchapter contains the general administrative regulations governing claims filed under the LHWCA, and Part 703 of this subchapter contains the regulations governing authorization of insurance carriers, authorization of self-insurers, and issuance of certificates of compliance with said insurance regulations, as required by sections 32 and 37 of the LHWCA, 33 U.S.C. 932, 937. Inasmuch as the extensions of the LHWCA (see § 701.101) incorporate by reference nearly all of the provisions of the LHWCA,

such that the regulations governing the latter apply to the extensions with very few exceptions, it has been determined that no useful purpose would be served by repeating the same provisions for each of the extensions. Accordingly, the regulations in Parts 702 and 703 shall apply to the administration of the extensions (DBA, DCCA, OCSLA, and NFIA), unless otherwise noted. The exceptions to the general applicability of Parts 702 and 703 of this subchapter are set forth in succeeding parts in this subchapter Part 704 of this subchapter contains the exceptions for the DBA, the DCCA, the OCSLA, and the NFIA.

OFFICE OF THE WORKMEN'S COMPENSATION PROGRAMS

§ 701.202 Transfer of functions.

Pursuant to the authority vested in him by the Secretary of Labor, the Assistant Secretary for Employment Standards has transferred from the Bureau of Employees' Compensation to the Office of Workmen's Compensation Programs all functions of the Department of Labor with respect to the administration of benefits programs under the following statutes:

(a) The Longshoremen's and Harbor Workers' Compensation Act, as amended and extended, 33 U.S.C. 901 et seq.;

(b) Defense Base Act, 42 U.S.C. 1651 et seq.;

(c) District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 et seq;

(d) Outer Continental Shelf Lands Act, 43 U.S.C. 1331;

(e) Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 et seq.;

(f) Title IV of the Federal Coal Mine Health and Safety Act, 83 Stat, 742, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150.

TERMS USED IN THIS SUBCHAPTER

§ 701.301 Definitions and use of terms.

(a) As used in this subchapter, except where the context clearly indicates otherwise:

(1) "Act means the Longshoremen's and Harbor Worker's Compensation Act, as amended (33 U.S.C. 901 et seq.), also referred to in this subchapter as LHWCA, and includes the provisions of any statutory extension of such Act (see § 701.101) pursuant to which compensation on account of an injury is sought.

(2) "Secretary" means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(3) "Employment Standards Administration" means the Employment Standards Administration in the United States Department of Labor, headed by the Assistant Secretary of Labor for Employment Standards.

(4) "Administrator" means the Deputy Assistant Secretary for Employment Standards in the Employment Standards Administration who also is Administrator of the Wage and Hour Division, and includes the Deputy Administrator for Wage and Compensation Programs.

(5) "Office of Workers' Compensation Programs or "OWCP" or "the Office" means the Office of Workers' Compensation Programs in the Department of Labor, described in § 701.201 of this Part. Whenever the term "Office of Workmen's Compensation Programs" appears in this part or in Part 702, it shall have the same meaning as "Office of Worker's Compensation Programs."

(6) "Director" means the Director, OWCP, or his authorized representative.

(7) "Deputy Commissioner" means a person appointed as provided in sections 39 and 40 of the LHWCA or his designee, authorized by the Director to perform functions with respect to the processing and determination of claims for compensation under such Act and its extensions as provided therein and in this subchapter.

(8) "Administrative Law Judge" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart B of 5 CFR Part 930 (see 37 FR 16737), who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for compensation arising under the LHWCA and its extensions.

(9) "Chief Administrative Law Judge" means the Chief Judge of the Office of Administrative Law Judges, United States Department of Labor.

(10) "Board" or "Benefits Review Board" means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as amended and constituted and functioning pursuant to the provisions of Chapter VII of this Title 20 and Secretary of Labor's Order No. 38-72 (38 FR 90).

(11) "Department" means the United States Department of Labor.

(12) "Employee" includes any employee to whom an injury, as defined in section 2(3) of the LHWCA, may be

the basis for a compensation claim under the LHWCA as amended, or any of its extensions.

(13) "Employer" includes any employer who may be obligated as an employer under the provisions of the LHWCA as amended or any of its extensions to pay and secure compensation as provided therein.

(14) "Carrier" means an insurance carrier or self-insurer meeting the requirements of section 32 of the LHWCA as amended and of this subchapter with respect to authorization to provide insurance fulfilling the obligation of an employer to secure the payment of compensation due his employees under the LHWCA as amended or a statutory extension thereof.

(15) The terms "wages", "national average weekly wage", "injury", "disability", "death", and "compensation" shall have the meanings set forth in section 2 of the LHWCA.

(16) "Claimant" includes any person claiming compensation or benefits under the provisions of the LHWCA as amended or a statutory extension thereof on account of the injury or death of an employee.

(b) The definitions contained in paragraph (a) of this section shall not be considered to derogate from any definitions or delimitations of terms in the LHWCA as amended or any of its statutory extensions in any case where such statutory definitions or delimitations would be applicable.

(c) As used in this subchapter, the singular includes plural and the masculine includes the feminine.

[38 FR 26860, Sept. 26, 1973, as amended at 42 FR 3848, Jan. 21, 1977]

§ 801.2 Definition and Use of Terms.

(a) For purposes of this chapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) "Acts" means the several Acts listed in §§ 801.102 and 802.101 of this chapter, as amended and extended, unless otherwise specified.

(2) "Board" means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as described in § 801.101, and provided in this Part and Secretary of Labor's Order No. 3872 (38 FR 90).

(3) "Chairman" or "Chairman of the Board" means Chairman of the Benefits Review Board.

(4) "Secretary" means the Secretary of Labor.

(5) "Department" means the Department of Labor.

(6) "Judge" means an administrative law judge appointed as provided in 5 U.S.C. 3105 and Subpart B of 5 CFR Part 930 (see 37 FR 16787); who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in repect of any claim for benefits or compensation arising under the Acts.

(7) "Chief Administrative Law Judge" means the Chief Administrative Law Judge of the Department of Labor.

(8) "Director" means the Director of the Office of Workmen's Compensation Programs of the Department of Labor (hereinafter OWCP).

(9) "Deputy commissioner" means a person appointed as provided in sections 39 and 40 of the LHWCA or his designee, authorized by the Director to make decisions and orders in respect to claims arising under the Acts.

(10) "Party" or "Party in interest" means the Secretary or his designee and any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken.

(11) "Day" means calendar day.

(b) Masculine gender includes the feminine, and the singular includes the plural.

(c) The definitions contained in this part shall not be considered to derogate from the definitions of terms in the respective Acts.

(d) The definitions pertaining to the Acts contained in the several parts of Chapter VI of this Title 20 shall be applicable to this chapter as is appropriate.

§ 801.102 Review authority.

(a) The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

(1) The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.;

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 et seq.;

(3) The District of Columbia Workmen's Compensation Act (DCWCA), 36 D.C. Code 501 et seq.;

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331;

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 et seq.;

(6) Title IV, section 415 and Part C, of the Federal Coal Mine Health and Safety Act (FCMHSA), 83 Stat. 742, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150 (30 U.S.C. 901 et seq.).

§ 802.101 Purpose and scope of this Part.

(a) The purpose of this Part 802 is to establish the rules of practice and procedure governing the operation of the Benefits Review Board.

(b) The rules promulgated in this part apply to all appeals taken by any party in interest from decisions or orders with respect to claims for compensation or benefits under the following Acts:

(1) The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 et seq.;

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 et seq.;

(3) The District of Columbia Workmen's Compensation Act (DCCA), 36 D.C. Code 501 et seq.;

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331;

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 et seq., and

(6) Title IV, section 415 and Part C, of the Federal Coal Mine Health and Safety Act (FCMHSA), 83 Stat. 742, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150.

§ 802.403 Issuance of decisions; service.

(a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceed-

ings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of such decisions under section 21(c) of the LHWCA.

(b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or documents filed with the Board, and a copy of the decision shall be returned to the appropriate deputy commissioner for filling.

(c) Proof of service of Board decisions shall be certified by the Clerk of the Board.

JUDICIAL REVIEW

§ 802.410 Judicial review of Board decisions.

(a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may take an appeal to the U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in § 802.101(b), shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

[42 FR 16133, Mar. 25, 1977]

§ 704.001 Extensions covered by this part.

(a) Defense Base Act (DBA).

(b) District of Columbia Workmen's Compensation Act (DCCA).

(c) Outer Continental Shelf Lands Act (OCSLA).

(d) Nonappropriated Fund Instrumentalities Act (NFIA).

§ 704.002 Scope of part.

The regulations governing the administration of the LHWCA as set forth in Parts 702 and 703 of this subchapter govern the administration of the LHWCA extensions (see § 704.001) in nearly every respect, and are not repeated in this Part 704. Such special provisions as are necessary to the proper administration of each of the extensions are set forth in this Part 704. To the extent of an inconsistency between regulations in Parts 702 and 703 of this subchapter and those in this Part 704, the latter supersedes those in Part 702 and 703 of this subchapter.

§ 704.151 DBA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employers' liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the provisions of the Defense Base Act, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

Appendix D—Longshoremen's and Harbor Workers' Compensation Act, 20 C.F.R.

The Company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The Company agrees to abide by all the provisions of said Acts and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the Deputy Commissioner and to this employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

Appendix E—Motion to Amend and Reform Caption.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-3136

HOME INDEMINTY COMPANY,

Petitioner,

v.

BARBARA A. STILLWELL,

R. E. LEE ELECTRIC COMPANY,

HEYL & PATTERSON, INTERNATIONAL, INC.,

and

TRAVELERS INSURANCE COMPANY,

Respondents.

MOTION TO AMEND AND REFORM CAPTION

The Director of the Office of Workers' Compensation Programs, United States Department of Labor, hereby respectfully moves for amendment and reformation of the caption of this proceeding, to designate the Director a respondent. As grounds therefor, the Director would show that he is the delegate of the Secretary of Labor responsible for the implementation, enforcement, and administration of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-950

(1976), and its several statutory extensions, including the Defense Base Act, as amended, 42 U.S.C. §§ 1651-1654 (1976), under which this case arises;[1] that he was a party to the proceedings below, before the Benefits Review Board, under the applicable regulations,[2] although he took no active role before the Board because of the limited precedential importance of the issues presented there; that he has been designated the proper agency party in judicial-review proceedings conducted pursuant to Longshoremen's Act § 21(c), as amended, 33 U.S.C. § 921(c) (1976), under which this case was filed in this Court;[3] that this Court has recognized the importance of the interest of the Director, as administrator of the Act, in participation on judicial proceedings under the Act which involve issues affecting the operation of the workers' compensation programs within his responsibility;[4] that this Court has without exception granted similar motions, seasonally made, in the past;[5] and that although the substantive issues in this case appear to remain of no substantial administrative or precedential importance, the issue which has arisen for the first time in this Court—what court has jurisdiction of judicial-review proceedings in a Defense Base Act case—is of substantial importance to the administration of the Act, for reasons to be fully described in a Petition for Rehearing which the Director proposes to file with respect to the Court's decision of May 1, 1979, herein.

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[1] *See, e.g., Longshoremen's Act* § 39, as amended, 33 U.S.C. § 939; 20 CFR §§ 701.101-.203 (1978).

[2] *See* 20 CFR § 801.2(a)(10) (1978).

[3] *See* 20 CFR § 802.410(b) (1978).

[4] *See Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 641-49 (6th Cir. 1977), particularly at 645-46, 648-49.

[5] *See, e.g., Navy Exchange CPO Club* v. *Faulkner*, No. 75-2255 (6th Cir., motion granted Dec. 8, 1975). *See also United Brands Co.* v. *Melson*, 569 F.2d 214 (5th Cir. 1978).

Wherefore, the caption should be amended and reformed to designate the Director, Office of Workers' Compensation Programs, United States Department of Labor, a respondent.

Respectfully submitted,

CARIN ANN CLAUSS
CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
LAURIE M. STREETER
Associate Solicitor

JOSHUA T. GILLELAN, II
JOSHUA T. GILLELAN, II
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite N2716
Washington, D.C. 20210
(202) 523-7643

In The

Supreme Court of the United States

OCTOBER TERM 1978

No. 79-152

The Home Indemnity Company,
Petitioner,

vs.

Barbara A. Stillwell,
Respondent

and

R. E. Lee Electric Company, Inc.,
Respondent,

and

Heyl & Patterson International, Inc.,
Respondent,

and

Travelers Insurance Company,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari

Harold Aryai Siegel
16 Maplewood Court
Post Office Box 25
Greenbelt, MD 20770
Attorney for Respondent
R. E. Lee Electric Company

STATEMENT OF THE CASE

The widow-respondent initiated a claim for death benefits under the Defense Base Act relative to the death of her husband while working on a Government subcontract issued to respondent R. E. Lee Electric Company for the electrical work on a housing project at the United States Naval Base in Guantanamo Bay, Cuba. Respondent Lee purchased insurance from petitioner, including workmen's compensation type coverage, but petitioner denied the coverage extended to work done at Guantanamo Bay. Applying principles of agency law, the Administrative Law Judge held that petitioner's coverage did extend to Guantanamo Bay.

The decision was appealed to the Benefits Review Board which affirmed the

decision against petitioner. The petitioner then appealed to the Sixth Circuit Court of Appeals which dismissed the appeal for want of jurisdiction on two grounds.

REASON FOR DENYING THE WRIT

The Court's attention is called to the fact that the United States Court of Appeals for the Sixth Circuit dismissed the Petition for Review for want of jurisdiction for two separate and distinct reasons.

First, the Sixth Circuit held that, whether through legislative oversight or intent, the plain language of the Defense Base Act is unambiguous and does not provide for direct review of Department of Labor compensation orders in any Court of Appeals. The Sixth

Circuit Opinion dwelled in great length on this point. In turn, Petitioner's entire request for a Writ of Certiorari addresses this one point.

Second, the Sixth Circuit held that even if this particular compensation order was reviewable in some Court of Appeals, the Sixth Circuit was not the proper Court. This second reason for denying jurisdiction appears very briefly in the next to last paragraph of the Opinion as follows:

> "....Section 921 (c) provides that "any person adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States court of appeals for the circuit in which the injury occurred...." Guantanamo Bay, Cuba, is not

> included in any judicial circuit. More particularly, for our purpose, Guantanamo Bay is not in the Sixth Circuit. Therefore, if we apply S921 (c) as the petitioner suggests judicial review of the case in any forum may be foreclosed."
>
> (emphasis supplied)

Petitioner and all Respondents stipulated below, at the hearing before the Administrative Law Judge, "that at the time of said injury the said deceased was an employee of the R. E. Lee Electric Company and working at and on the United States Naval Base at Guantanamo Bay, Cuba." (Stipulation No. 3) (Appendix C, Page 18a of Petition).

The "composition" of the Sixth

Circuit Court of Appeals is Kentucky, Michigan, Ohio, and Tennessee. (28 USC 41)

Clearly, then, even if Petitioner was to prevail on the point that a Court of Appeals is the next step in the chain authorized to hear an appeal of this Department of Labor compensation order, issued under the Defense Base Act, 28 USC 41 does not give the Sixth Circuit jurisdiction over injuries sustained at Guantanamo Bay, Cuba. This being a fact, granting Petitioner's writ would serve no useful purpose in this particular case. If the statutory scheme in the present wording of the Defense Base Act is not what Congress intended, the Department of Labor can initiate action to have the statute amended by Congress.

The Eight Circuit Court of Appeals had occasion to throughly consider the exact question of whether, during appellate review of compensation orders issued under the Longshoremen's and Harbour Workers' Compensation Act (the provisions of which were incorporated, in part, into the Defense Base Act), appellant's choice of the wrong forum relates to jurisdiction or just to venue. In deciding that the place of the injury was just East of the middle of the Mississippi River, slightly outside the statutory boundaries of the lower court, the Eighth Circuit said:

> "Considering the real character of this proceeding as defined in subdivision (b), the apparently meticulous care with which the use of various courts is defined in the

several sections of the Act, and the emphatically expressed limitations in subdivision (d), we think the requirement that the proceeding be in the Court of the district wherein the injury or death occured is not merely one of venue but is jurisdictional."

Bassett, Deputy Com'r et al v Massman Const. Co., 8 Cir, 120 F. 2d 230 (1941), cert den 314 US 648, 62 S.Ct. 92, 86 L. Ed. 520

This position was followed in the Third and Ninth Circuit Court of Appeals, in the cases of Atlantic Ship Rigging Co. v McLellan, 288 F. 2d 589 (1961) and Continental Fire and Casualty Ins. Co. v O'Leary, 236 F. 2d 282 (1956), respectively, as well as by several lower Courts.

Although these case were decided before the 1972 Amendments to the Acts

involved, their teaching remains sound: to wit, the statutory scheme still is to confer jurisdiction to review this compensation order only on the Court having jurisdiction over the place of the injury.

Finally, Appellate Rule 15 provides that the Petition for Review of the Administrative Law Judge decision must be filed with the Clerk of the Court of Appeals authorized to review such order. The Sixth Circuit correctly decided that it was not so authorized.

CONCLUSION

The Sixth Circuit reached its decision based on two independently correct theories supporting its finding that it lacked jurisdiction. Since Petitioner only argues that one of the

theories is in error, the writ should not be granted.

Respectfully submitted,

Harold Aryai Siegel
16 Maplewood Court
P. O. Box 25
Greenbelt, MD 20770
Attorney for Respondent
R. E. Lee Electric Co.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 79-152

THE HOME INDEMNITY COMPANY,
Petitioner,
v.
BARBARA A. STILLWELL,
Respondent,
and
R. E. LEE ELECTRIC COMPANY, INC.
Respondent,
and
HEYL & PATTERSON INTERNATIONAL, INC.,
Respondent,
and
TRAVELERS INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES F. JORDAN
900 Seventeenth Street, N.W.
Washington, D.C. 20006
Attorney for Respondent,
Travelers Insurance Company

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

CASES CITED:

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-152

THE HOME INDEMNITY COMPANY,
Petitioner,

v.

BARBARA A. STILLWELL,
Respondent,

and

R. E. LEE ELECTRIC COMPANY, INC.
Respondent,

and

HEYL & PATTERSON INTERNATIONAL, INC.,
Respondent,

and

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, The Travelers Insurance Company, respectfully prays that the Petition for a Writ of Certiorari be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Petitioner's Appendix A) is reported at 597 F.2d 87. That Court's Order of dismissal, filed May 1, 1979, is printed as Appendix A hereto.

(Respondent believes that the administrative decisions below, Petitioner's Appendices B and C, are not pertinent to this Petition but agrees that these decisions are stated fully in Petitioner's Appendices.)

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly construe 33 U.S.C. 921(c) and 42 U.S.C. 1653(b) and thereby correctly deny jurisdiction over Petitioner's request for review?

FEDERAL STATUTES AND REGULATIONS

A. Statutes

Respondent agrees that Petitioner's extracts of 42 U.S.C. 1653(b) are pertinent. In addition, Respondent extracts the following:

42 U.S.C. 1651(a) (Defense Base Act) (55 Stat. 622).

> (a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1977 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee. . . .

B. Regulations

Respondent agrees that the Petitioner's extracts from Title 20, Code of Federal Regulations contained in the Petition and Petitioner's Appendix D (pp. 34a-44a) are pertinent. For the convenience of this Court, Respondent sets out in full in Appendix B hereto the additional Code of Federal Regulations citations made by Petitioner, but omitted from its Appendix.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the United States Court of Appeals (Petitioner's Appendix A, at pp. 2a-3a).

ARGUMENT

I. *The Decision Of The United States Court Of Appeals For The Sixth Circuit Does Not Deprive Parties Of Their Rights To Due Process.*

The court below correctly held that review of a compensation order entered under the Defense Base Act (DBA) (42 U.S.C. 1651, et seq.) upon a decision by the Benefits Review Board must be made to a United States District Court. Petitioner's arguments regarding deprivations of due process rights are inapposite.

The decision below safeguards and applies the judicial review procedures provided by the Defense Base Act (42 U.S.C. 1653(b)). Thus, Petitioner appears to suggest that the Defense Base Act review procedures, which have existed since 1941, are now violative of due process. There is no decision of this Court, or any other, to support such a contention.

Petitioner's reference to a deputy commissioner's *decision* is not supported by a reading of 42 U.S.C. 1653(b). That Section refers only to a *compensation order*.

Both the statutory language of the Defense base Act (42 U.S.C. 1651(a)) and the provisions of Title 20 Code of Federal Regulations cited by Petitioner support the decision below. The provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, et seq.) (LHWCA) apply to the Defense Base Act only unless modified by the latter Act. Section 1653(b) of that Act clearly provides such a modification. Section 701.102 of Title 20 Code of Federal Regulations further recognizes the obvious differences between the LHWCA and the DBA (Petitioner's Appendix D, at pp. 34a-35a).[1]

Finally, Petitioner's assertion that 42 U.S.C. 1653(b) has, as its only purpose, the prescription of venue rather than jurisdiction is not supported by the

[1] 20 CFR 701.102. Inasmuch as the extensions of the LHWCA (see §701.101) incorporate by reference *nearly* all of the provisions of the LHWCA, such that the regulations governing the latter apply to the extensions *with very few exceptions*, it has been determined that no useful purpose would be served by repeating the same provisions for each of the extensions. (Emphasis supplied).

case law. *Lockheed Overseas Corporation* v. *Pillsbury*, 58 F.Supp. 375 (S.D. Cal. 1944).

II. *The Decision Below Properly Construes 42 U.S.C. 1653(b).*

The enactment of the Longshoremen's Act Amendments in 1972 did nothing to alter, modify or conform any of the pre-existing statutory provisions of the Defense Base Act.

The construction of that Act by the Sixth Circuit will not create incongruity. In point of fact, if Petitioner's argument is correct, claims arising under the Defense Base Act would have to be reviewed in the United States Circuit Courts of Appeals which comprise such locations as Antarctica and Nepal[2], rather than in the federal district court where the compensation order was entered or in the federal district court nearest the place of the injury or accident.[3] Since there are no such circuits[4], such a result could not have been intended by the Congress and there was, therefore, no implicit repeal of the Defense Base Act review procedures.

Petitioner's contention that Congress' enactment of the LHWCA Amendments in 1972 repealed Section 1653(b) of the DBA by indirection cannot sustain

[2] *Vishniac* v. *University of Rochester, et al*, B.R.B. No. 76-431, 8 BRBS 21 (1978) (Accidental death occasioned by a fall in Antarctica in which the DBA was applied); *Smith* v. *Board of Trustees, Southern Illinois University, et al*, B.R.B. No. 77-474, 8 BRBS 197 (1978) (Accidental death in Kathmandu, Nepal in which a potential DBA claim was recognized).

[3] 42 U.S.C. 1653(b).

[4] 28 U.S.C. 41 (65 Stat. 723).

analysis under standard rules of statutory construction.

> A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendment of the referred statute will have no effect on the reference statute. 2A Sutherland on Statutory Construction §51.08 (4th ed. C. Sands 1973). (Footnotes omitted).

III. *The Decision Below Is Not Inconsistent With The Sixth Circuit's Opinion In Director, OWCP* v. *Eastern Coal Corporation (561 F.2d 632).*[5]

The decision in *Eastern Coal* was concerned with the applicability of the LHWCA Amendments to the Black Lung Benefits Act and, as such, is clearly distinguishable, particularly since:

> [T]he Black Lung regulation had never had any separate provisions for judicial review but had from the passage of this legislation in 1969 contained provisions incorporating the adjudicatory measures of the Longshoremen's Act. *Id.*, at 640.

The Defense Base Act, on the other hand, contained explicit judicial review provisions prior to the LHWCA Amendments of 1972. These provisions were unchanged by those Amendments.

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[5] Even if the decision below does present a direct conflict with the earlier Sixth Circuit opinion that does not constitute sufficient grounds for review by this Court, *See, e.g., Wisniewski* v. *United States*, 353 U.S. 901 (1957).

IV. *Although This Case Presents An Issue Not Heretofore Considered By This Court, Review Is Unnecessary.*

The decision of the court below has neither foreclosed the rights of persons subject to the provisions of the Defense Base Act nor has it created any doubt as to the status of those rights.

That decision simply clarifies the interrelationship between the Longshoremen's Act and the Defense Base Act; the new adjudicatory/administrative procedures of the former do apply to the latter but the judicial review provisions of the DBA remain in full force and effect.

Review by this Court is unnecessary. Petitioner points to no inter-circuit conflicts on this issue. Further development of the law should be left to the Congress or to the lower courts.

V. *The Decision Below Will Not Impede The Administration Of Claims Under The Defense Base Act.*

Petitioner appears to argue that the decision of the Court of Appeals actually deprives the Benefits Review Board of subject matter jurisdiction over Defense Base Act claims since that Act, Section 1653(b), speaks only to a compensation order of a deputy commissioner, yet, pursuant to the 1972 Amendments to the Longshoremen's Act, in the present claim, there was no such compensation order involved.

It is true that, under the regulations implementing the Longshoremen's Act Amendments of 1972, com-

pensation orders in contested claims are prepared by the Administrative Law Judge (20 CFR 702.348).[6]

However, it is also clear that such compensation orders become effective only upon filing in the office of a deputy commissioner (20 CFR 702.350).[7] Thus, a deputy commissioner must act affirmatively to effectuate any compensation order and is "involved" with any such order (42 U.S.C. 1653(b)).

The opinion of the court below comprehends such a reading since the Sixth Circuit did not question the jurisdiction either of the Administrative Law Judge or of the Benefits Review Board to hear the subject compensation claim.

VI. *The Decision Below Was Correct, Even Assuming That Petitioner's Reliance On 33 U.S.C. 921(c) Is Appropriate.*

Petitioner sought review of the decision of the Benefits Review Board, pursuant to 33 U.S.C. 921(c), in the United States Court of Appeals for the Sixth Circuit (Petition, at p. 8). The compensation claim at issue arose out of an injury which occurred at and on the United States Naval Base at Guantanamo Bay, Cuba (Petitioner's Appendix C, at p. 18a).

Section 921(c) of the Longshoremen's Act prescribes that judicial review of an administrative decision be taken "... in the United States Court of Appeals for the Circuit in which the injury occurred ...".

[6] *See*, Appendix C herein.

[7] *See*, Appendix C herein.

As the court below noted:

> Guantanamo Bay, Cuba is not included in any judicial circuit. More particularly, for our purposes, Guantanamo Bay is not in the Sixth Circuit. 597 F.2d 87,90. *See also*, 28 U.S.C. 41 (65 Stat. 723).

The Petitioner, even under its own view of the applicable review procedures, simply chose the wrong court in which to perfect review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES F. JORDAN
900 Seventeenth Street, N.W.
Washington, D.C. 20006
Counsel for Respondent, The Travelers Insurance Company

Of Counsel:

CARR, JORDAN, COYNE & SAVITS
900 Seventeenth Street, N.W.
Washington, D.C. 20006

APPENDIX

APPENDIX A - ORDER OF DISMISSAL

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE HOME INDEMNITY COMPANY,
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v.

BARBARA A. STILLWELL,
Respondent,

and

R. E. LEE ELECTRIC COMPANY,
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and

HEYL & PATTERSON, INTERNATIONAL, INC.,
Respondent,

and

TRAVELERS INSURANCE COMPANY,
Respondent.

Order

May 1, 1979

Before: CELEBREZZE, KEITH and MERRITT, *Circuit Judges.*

On petition for review of decisions of Benefits Review Board of the Department of Labor,

This cause came on to be heard on the briefs and record of proceedings before the Benefits Review Board of the Department of Labor and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition to review be and it is hereby dismissed.

It is further ordered that Respondents recover from Petitioner the costs on appeal, as itemized below.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman
Clerk

ISSUED AS MANDATED:
June 29, 1979
COSTS: (To be awarded to respondent Travelers Insurance Co.)

Filing fee	$ .....
Printing	$ 856.27
TOTAL	$ 856.27

APPENDIX B - LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES, 20 CFR

ACTION BY DEPUTY COMMISSIONERS

§702.311 Handling of claims matters by deputy commissioners; informal conferences.

The deputy commissioner is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the deputy commissioner's office. Some cases will be handled by written correspondence. The regulations governing informal conferences at the deputy commissioner's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the deputy commissioner and his staff shall make certain that a full written record be made of the matters discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

§702.312 Informal conferences; called by and held before whom.

Informal conferences shall be called by the deputy commissioner or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the deputy commissioner, except that a compensation order following an agreement shall be issued only by a person so designated by the Director to perform such duty.

§ 702.315 Conclusion of conference; agreement on all matters with respect to the claim.

(a) Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall (within 10 days after conclusion of the conference), embody the agreement in a memorandum or within 30 days issue a formal compensation order, to be filed and mailed in accordance with § 702.349. If either party requests that a formal compensation order be issued the deputy commissioner shall, within 30 days of such request, prepare, file, and serve such order in accordance with § 702.349. Where the problem was of such nature that it was resolved by telephone discussion or by exchange of written correspondence, the parties shall be notified by the same means that agreement was reached and the deputy commissioner shall prepare a memorandum or order setting forth the terms agreed upon. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

(b) Where there are several conferences or discussions, the provisions of paragraph (a) of this section do not apply until the last conference. The deputy commissioner shall, however, prepare and place in his administrative file a short, succinct memorandum of each preceding conference or discussion.

§ 702.316 Conclusion of conference; no agreement on all matters with respect to the claim.

When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the deputy commissioner shall bring the conference to a close, shall evaluate all evidence available to him

or her, and after such evaluation shall prepare a memorandum of conference setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent by certified mail to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the deputy commissioner whether they agree or disagree with his or her recommendations. If they agree, the deputy commissioner shall proceed as in § 702.315(a). If they disagree (Caution: See § 702.134), then the deputy commissioner may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the deputy commissioner shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (See § 702.317, §§ 702.331–.351).

§ 702.317 Preparation and transfer of the case for hearing.

A case is prepared for transfer in the following manner:

(a) The deputy commissioner shall furnish each of the parties or their representatives with a copy of a pre-hearing statement form.

(b) Each party shall, within 21 days after receipt of such form, complete it and return it to the deputy commissioner and serve copies on all other parties. Extensions of time for good cause may be granted by the deputy commissioner.

(c) Upon receipt of the completed forms, the deputy commissioner, after checking them for completeness and after any further conferences that, in his or her opinion, are warranted, shall transmit them to the Office of the Chief Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearing (exclusive of X-rays, slides

and other materials not suitable for mailing which may be offered into evidence at the time of hearing); the materials transmitted shall not include any recommendations expressed or memoranda prepared by the deputy commissioner pursuant to § 702.316.

(d) If the completed pre-hearing statement forms raise new or additional issues not previously considered by the deputy commissioner or indicate that material evidence will be submitted that could reasonably have been made available to the deputy commissioner before he or she prepared the last memorandum of conference, the deputy commissioner shall transfer the case to the Office of the Chief Administrative Law Judge only after having considered such issues or evaluated such evidence or both and having issued an additional memorandum of conference in conformance with § 702.316.

(e) If a party fails to complete or return his or her prehearing statement form within the time allowed, the deputy commissioner may, at his or her discretion, transmit the case without the party's form. However, such transmittal shall include a statement from the deputy commissioner setting forth circumstances causing the failure to include the form, and such party's failure to submit a prehearing statement form may, subject to rebuttal at the formal hearing, be considered by the administrative law judge, to the extent intransigence is relevant, in subsequent rulings on motions which may be made in the course of the formal hearing.

§ 702.331 Formal hearings; procedure initiating.

Formal hearings are initiated by transmitting to the Office of the Chief Administrative Law Judge the pre-hearing statement forms, the available evidence which the parties intend to submit at the formal hearing, and the letter of transmittal from the deputy commissioner as provided in § 702.316 and § 702.317.

§ 702.391 Appeals; where.

Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeals with the office of the deputy commissioner for the compensation disrict in which the decision or order appealed from was filed and by submitting to the Board a petition for review of such decision or order, in accordance with the provisions of Part 802 of this Title 20.

APPENDIX C - LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES, 20 CFR

§ 702.348 Formal hearings; preparation of final decision and order; content.

Within 20 days after the offical termination of the hearing as defined by § 702.347, the administrative law judge shall have prepared a final decision and order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of facts and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge, his signature, and the date of issuance.

§ 702.350 Finality of compensation orders.

Compensation orders shall become effective when filed in the office of the deputy commissioner, and unless proceedings for suspension or setting aside of such orders are instituted within 30 days of such filing, shall become final at the expiration of the 30th day after such filing, as provided in section 21 of the Act 33 U.S.C. 921. If any compensation payable under the terms of such order is not paid within 10 days after it becomes due, section 14(f) of the Act requires that there be added to such unpaid compensation an amount equal to 20 percent thereof which shall be paid at the same time as, but in addition to, such compensation unless review of the compensation order is had as provided in such section 21 and an order staying payment has been issued by the Benefits Review Board or the reviewing court.